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IN THE

Supreme Court of the United States

October Term 1958

No. 523

GEORGE BECKER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions

The opinion of the District Court is reported at 58 U. S. T. C. ¶9403. It is also reprinted in the Appendix prepared for use by the Court at p. 189. Nine copies of this Appendix have been filed in accordance with Rule 21, Paragraph 4. The opinion of the Court of Appeals, attached to this petition, has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 22, 1958. The jurisdiction of this Court is invoked

under the provisions of Title 28, Section 1255, United States Code.

Questions Presented

1. Did the District Court and the Court of Appeals err in assuming that "neglect" to produce books as demanded by a Treasury summons constitutes a crime although there had been no application to a District Court to compel compliance with the summons?

2. In holding the defendant guilty of neglecting to produce records, although finding that the defendant was ignorant of their existence, did the District Court apply a standard of criminal conduct in conflict with what may constitutionally be made criminal under this Court's rule in *Lambert* v. *California*, — U. S. — , 2 L. ed. 2d 228?

Constitutional and Statutory Provisions Involved

Fifth Amendment to the Constitution

"No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

Title 26, United States Code

§ 7210. Failure to Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 7602, 7603 and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall upon conviction thereof,

be fined not more than $1,000 or imprisoned not more than 1 year, or both, together with costs of prosecution. As amended Apr. 2, 1956, c. 160, Sec. 4(h), 70 Stat. 91; June 29, 1956, c. 462, Title II, Sec. 208(d)(3), 70 Stat. 396.

§ 7602. Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 901.

§ 7603. Service of Summons

A summons issued under Section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records or other data are described with reasonable certainty. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 902.

§ 7604. Enforcement of Summons

• • •

(b) *Enforcement.* Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the Judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent

with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience:

* * *

Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 902.

Statement of the Case

Petitioner was convicted of violating Section 7210 of Title 26, United States Code, by neglecting to produce certain records. He was sentenced to imprisonment for thirty days and fined $1,000.00.

Petitioner is the president of the Becker & Davis Fur Corporation. In September and November, 1955, agents of the Internal Revenue Service for divers purposes examined the books of the corporation for the fiscal years 1952 to 1955. At that time all these records were available and were produced for examination by the Revenue Agents (A. 190). Almost a year later, in August, 1956, there was served upon petitioner a summons calling for the production of the same records (A. 191). Meanwhile there had been a small fire on the premises of the corporation and for the purposes of the decision the District Court allowed for the possibility that some of the records had been destroyed by the fire (A. 193). When the summons was served on petitioner the agent serving the summons asked petitioner to give the summons to the firm's bookkeeper who informed the Special Agent in the presence of petitioner that the records had been destroyed in the fire (A. 97-98, 192). Petitioner also called the accountant for the firm to find out whether any of the records were in the possession of the accountant. The accountant stated that

he had none of the records (A. 192). Petitioner thereafter appeared in response to the summons and testified that the records were not available. No judicial proceedings to enforce compliance with the summons were instituted.

About a year after the summons, petitioner was served with a grand jury subpoena calling for the production of the same records and at that time his attorney discovered that some of the records were still in existence and they were duly produced for the grand jury (A. 130). The lower courts do not question that petitioner, or for that matter the bookkeeper, at the time petitioner failed to produce the records, was under the impression that they had been destroyed by fire (A. 195). In fact only some of the records were subsequently found (A. 196). Nonetheless, the District Court found petitioner guilty because "if he had made any sort of investigation at all" he would have found that some of the records called for by the summons were available. The Court equates that conduct to "wilfully and knowingly neglecting to produce records".

Reasons for Granting the Writ

1. The statutory scheme of which 26 U. S. C. Sec. 7210 is a part clearly contemplates that the Internal Revenue Service shall apply to the courts for enforcement of its summonses, thus affording an opportunity for judicial review, before persons summoned commit a crime by neglecting to comply. The courts below, *sub silentio,* assumed that this was not a preliminary requirement. Thus there is posed to this Court for settlement an important and novel question of federal law. Heretofore, as far as can be ascertained, long standing administrative practice

called for preliminary recourse to the courts. If it were authoritatively determined that such recourse is unnecessary, this salutary administrative practice may well be changed, and, in any case, such a rule would place into hitherto unsuspected jeopardy those hoping to challenge the administrative action in the course of the preliminary proceedings.

In pertinent part, Section 7210 provides that one "summoned to . . . produce books, . . . *as required under Sections* . . . *7602, 7603, and 7604(b)*, neglects to . . . produce such books" is guilty of a crime. Section 7602 gives authority to issue summonses, Section 7603 prescribes the mode of service, and Section 7604(b) provides for enforcement proceedings. No proceedings as described in Section 7604(b) were had. Neither the charge (A. 4) nor the proof was that petitioner was summoned as required by that section. The courts below read the quoted portion of Section 7210 as if the "and" carried also the meaning "or". This seemingly slight bit of grammatical violence, however, renders some of the statutory language meaningless or absurd.

Surely it can not be contended that failure to comply with a summons issued under Section 7602 but not served under 7603, or worse still, one served under 7603 but not authorized under 7602, is criminal. Similarly, Section 7604(b) merely complements the two other sections by adding another step, namely judicial enforcement. Nothing can be done under this section except to enforce by judicial process summonses issued and served under the two pre-

* The reference to the two other sections is not material to the discussion. In the Internal Revenue Code of 1954 these additional references do not appear. They were inserted by two separate amendments in 1956 which were intended to broaden the authority defined by Section 7602.

ceding sections. If judicial enforcement is irrelevant the reference to Section 7604(b) has no conceivable meaning. The one and only meaning which can be ascribed to it is that it manifests congressional intent that there must be an attempt at judicial enforcement before a crime is committed.

It should be noted that Section 7604(b) contemplates a court order before punishment even for contempt can be inflicted, because the order may not be "inconsistent with the law for punishment of contempts" and courts (with immaterial exceptions) have no jurisdiction to punish for contempt except for disobedience to their own process or orders. 18 U. S. C. Sec. 401; *Brody* v. *United States*, 243 F. 2d 378, 381 (1st Cir.), cert. den. 354 U. S. 923; *Gretsky* v. *Miller*, 160 F. Supp. 914.

Moreover, Section 7603 does not even call for personal service of the summons. It seems far fetched to assume that Congress intended that disobedience to such a summons shall be criminal before the more drastic notice under Section 7604(b) has been given. This construction is also in harmony with the Administrative Procedure Act. (5 U. S. C. Sec. 1005(c)).

The history is not enlightening as to the legislative intent. The antecedent of Section 7210 was first enacted in different form by the Revenue Act of 1864 (13 Stat. 227). It perpetuated itself in varying forms in every subsequent revenue act without discussion of its purpose or operation. No decision under this or its predecessor sections is reported. As far as can be determined the Section has remained a dead letter since the Internal Revenue Service always resorted to judicial enforcement proceedings. Evidently, such proceeding proved sufficiently effective so that

there was no occasion for criminal prosecutions. The First Circuit noted that judicial enforcement is more efficient and that criminal punishment is an alternative, but even by way of dictum it does not quite reach the question posed in the instant case. *Brody* v. *United States, supra*, p. 8.

It may well be that in 1864 the effectiveness of judicial enforcement was not clearly understood for it was not until much later that the contempt power of federal courts was better defined. Certainly, it was then not settled that the common law doctrine of purgation, *i.e.*, an affidavit of disclaimer of intent, did not bar criminal contempt (*Cf. Clark* v. *United States*, 289 U. S. 1), so that the possibility of a criminal prosecution, not as an alternative but as a more effective sanction to judicial enforcement, seemed then desirable. There is no reason why Sect. 7210 should not continue to serve this function. But there is every reason for this Court to determine whether judicial enforcement can be by-passed and whether it is safer to disregard a judicial subpoena or a court order (not criminal except as it may constitute contempt) than a Treasury summons. Thousands upon thousands of these summonses are issued every year and their precise status is a matter of grave concern to the recipients and their advisors.

If the rule assumed by the courts below is adopted, a person seeking to challenge a summons must from now on devise new remedies if he is to have his day in court without incurring the risk of first becoming a criminal.

2. It will be observed that Section 7210 requires no intent despite the severity of the penalties which it imposes. The courts below quite properly read into the statute a requirement that it can only be knowingly and wilfully violated. Thus the case superficially differs from *Lambert* v. *California*, — U. S. —, 2 L. ed. 2d 228. However, wilfull-

ness is a word of vague meaning. The District Court found that the petitioner thought that the records had been destroyed by fire (A. 195). As long as this petitioner held this mistaken belief there was, of course, no reason for him to think that he was required to make a search besides. Petitioner was in every sense of the word ". . . a person, wholly passive and unaware of any wrong doing" who nevertheless is stamped as a criminal by a statute which is much more drastic in its penalties than the one involved in the *Lambert* case. The lack of knowledge of a material fact which lulled petitioner into passivity is at least as important in vitiating intent, as the ignorance of law in the *Lambert* case. The interpretation of the words "knowingly and wilfully" by the lower courts make the ruling of the *Lambert* case a mere matter of verbal convenience. This interpretation of the statute would seem to be in conflict with the Due Process requirement of the Fifth Amendment and the decision of this Court in the *Lambert* case.

Conclusion

While the two questions involved were not expressly submitted to the courts below, they are nonetheless questions of importance, and for all the foregoing reasons it is respectfully prayed that the writ issue.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals For the Second Circuit

Before:

CLARK, *Chief Judge*, and
MEDINA and LUMBARD, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, Judge.

George Becker appeals from his conviction, under 26 U. S. C. section 7210, of failing to produce at the Internal Revenue Office certain summoned records of a corporation of which he was president.

* * *

Per Curiam:

In this case Judge Dawson, sitting without a jury after waiver by the defendant, found as a fact beyond a reasonable doubt that defendant wilfully and knowingly neglected to produce certain of the books and papers called for by a summons served upon him by a special agent of the Internal Revenue Service. This finding is amply supported by the evidence. The detailed statement of facts in the court's memorandum opinion belies defendant's assertion that it disregarded defendant's request for special findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure. We also find insubstantial the other alleged errors. Accordingly defendant's conviction under 26 U. S. C. section 7210 is affirmed.